

PP v. CHONG CHIENG JEN & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU J
[CRIMINAL APPEAL NO: KCH-42-AC-11-9-2017]
6 APRIL 2018

CONSTITUTIONAL LAW: *Fundamental liberties – Freedom of assembly – Respondents charged under Peaceful Assembly Act 2012 – Charges related to street protest – Definition of street protest – Participants moved from hotel to venue where approved peaceful assembly was held – Large crowd of participants encroached onto public roads and prominently displayed banners and flags supporting a particular cause – Whether intended walk metamorphosed into street protest within meaning of Peaceful Assembly Act 2012 – Whether dominant purpose or secondary purpose of mass march negated offence of street protest – Whether there was prima facie evidence of participation of respondents – Whether elements of offence under s. 4(2)(c) of Peaceful Assembly Act 2012 established*

The respondents were charged in the Sessions Court with the offence of participating in a street protest, an offence under s. 4(2)(c) of the Peaceful Assembly Act 2012 ('the PAA 2012'). On 29 August 2015, a non-governmental organisation called the Coalition for Clean and Fair Elections ('BERSIH') was allowed to hold an assembly at the Padang Song Kheng Hai ('Padang Song') in Kuching. The organisers of the assembly had asked the public to gather at four points around the city before proceeding to the venue at Padang Song. One of the four points was the Hilton Hotel ('Hilton'). The case for the prosecution was that a large crowd had gathered at Hilton, and among them were the first respondent (a Member of Parliament for Kuching) and the second respondent (a Member of Parliament for Stampin). The police advised the respondents and others to move to Padang Song. All those gathered outside Hilton then walked to Padang Song and the police were stationed all along the route. They took photographs and video clips and police witnesses testified that at times the group had encroached onto the road instead of keeping themselves on the sidewalk. Some in the group were seen displaying BERSIH banners prominently and some were even heard shouting political slogans. The prosecution submitted that the movement of the people from Hilton to Padang Song constituted a street protest within the meaning of PAA 2012 notwithstanding the fact that they wanted to participate in the approved BERSIH assembly at the latter venue. The Sessions Court Judge ('SCJ'), however, concluded that it was not a street protest within the meaning of PAA 2012. The main argument of the respondents, which appeared to have been wholly accepted by the Sessions Court, was that it was not a street protest because the people who had marched to Padang Song from Hilton wanted 'to access' the former venue where an approved assembly was about to take place. Thus, they had no intention to partake in a street protest and it was not the purpose of the walk

A to advance any particular cause either. The SCJ thus acquitted the respondents without calling for their defence. Hence, the prosecution appealed.

Held (allowing appeal):

- B (1) The PAA 2012 provides a definition of what constitutes a street protest. In the premises, if there was credible evidence to support the elements of the statutory definition of a street protest and that there was evidence that the respondents had participated in it, defence should have been called on the said charge. The SCJ fell into error in ruling that the fact that the participants of the said walk wanted access to Padang Song venue meant that there could not have been a street protest. The SCJ should have considered whether the evidence supported the elements of a street protest regardless of whether the participants had also wanted to access the Padang Song assembly venue. This was a legal question. Whether or not there was a street protest was a matter for the court to determine upon considering the elements of the offence and the evidence. (paras 32 & 34)
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- E (2) In the definition of street protest, Parliament does not provide that the dominant purpose or a secondary purpose of a mass march would negate the offence of street protest. The purpose of objecting to or advancing a particular cause may co-exist with another purpose which in this case was accessing the approved assembly venue at Padang Song. Thus, if from the point of departure to the point of arrival, the intended walk had metamorphosed into a street protest as well within the meaning of PAA 2012, it was no defence to say that the street protest was not the dominant purpose or the original purpose of the march. Intention is a matter of inference and it is trite law that it can develop on the spot. Otherwise, Parliament's aim in creating the offence of street protest would be completely frustrated. (para 33)
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- G (3) The prosecution had tendered unchallenged evidence that the participants numbering 400 had gathered outside Hilton and they carried flags and banners. The evidence on the point that a large group of people had walked together and even encroached onto the road not only came from the police witnesses but also from the photographs and video clips. The SCJ should have also considered the evidence that supported the prosecution's case that the participants wanted to advance the cause of BERSIH while walking towards Padang Song *ie*, the crowd of people had prominently displayed and waved banners, placards and flags that supported the cause of BERSIH and that the crowd had taken a longer route to Padang Song. Whether a mass march was peaceful or not was irrelevant for the purpose of a definition of a street protest. Since there was *prima facie* evidence of the participation of the respondents in the said march, defence should have been called. (paras 36-38 & 40)
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(4) The prosecution had tendered credible evidence in respect of all the elements of the offence under s. 4(2)(c) of the PAA 2012 and therefore the SCJ should have found that a *prima facie* case had been established. Thus, the order of acquittal was set aside and both respondents were ordered to enter their defence on the said charge before the same SCJ. (para 43)

Legislation referred to:

Peaceful Assembly Act 2012, ss. 2, 3, 4(1), (2)(c), (3), 7(b), 21

For the prosecution - Kamal Baharin Omar, Hayda Faridzal Abu Hassan & Haresh Prakash; DPPs

For the respondents - Chong Siew Chiang, Gobind Singh Deo, Michael Kong, Tan Kee Heng & Roger Chin; M/s Chong Brothers Advocs

[Editor's note: Appeal from Session Court; Criminal Case No: KCH-63-108-10-2015.]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] The respondents were charged in the Sessions Court with the offence of participating in a “street protest”. It is an offence under s. 4(2)(c) of the Peaceful Assembly Act 2012 (the PAA 2012) and it is punishable under s. 4(3) of the same Act. The prosecution called a total of seven witnesses. At the conclusion of the case for the prosecution, the learned Sessions Court Judge acquitted the respondents without calling for their defence. The prosecution has appealed this decision before this court.

[2] For ease of reference, before proceeding further, I shall set out the charge below:

Bahawa kamu bersama beberapa orang yang masih bebas, pada 29 Ogos 2015 di antara lebih kurang jam 2.00 petang hingga 3.00 petang bermula dari hadapan Hotel Hilton Kuching, Jalan Borneo melalui Jalan Tunku Abdul Rahman, Jalan Tabuan, Jalam Ban Hock sehingga ke padang Song Kheng Hai, di dalam Bandaraya Kuching, di dalam Negeri Sarawak, telah menyertai suatu protes jalanan bagi maksud memajukan suatu tujuan berkaitan Perhimpunan Bersih 4 anjuran gabungan Pilihanraya Bersih dan Adil (BERSIH) dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 4(2)(c) Akta perhimpunan Aman 2012 yang boleh dihukum di bawah seksyen 4(3) Akta yang sama.

Background Facts

[3] The PAA 2012 legalises a peaceful assembly of citizens in public and makes various provision to facilitate it. However, it criminalises a “street protest”. On 29 August 2015, a non-governmental organisation called the

A Coalition for Clean and Fair Elections was allowed to hold an assembly at the Padang Song Kheng Hai in Kuching. The said NGO is also known as BERSIH.

B [4] The assembly at Padang Song Kheng Hai proceeded as planned. The police did not object to the assembly at Padang Song Kheng Hai. No one was charged with any offence of participating in the assembly at the said venue. However, the organisers of the assembly had asked the public to gather at four points around the city by 2pm before proceeding to the venue at Padang Song Kheng Hai. One of the four points was the Hilton Hotel.

C [5] The case for the prosecution was that a large crowd gathered at the Hilton Hotel on the day in question from 1pm onwards. The respondents were among them. The first respondent is the Member of Parliament for Kuching whereas the second respondent is the Member of Parliament for Stampin. The first respondent allegedly told PW5 (the Kuching OCPD) outside the Hilton Hotel that he intended to wait for more participants before making his way to Padang Song Kheng Hai.

E [6] The police advised the respondents and others to move to Padang Song Kheng Hai. When the number of people had increased, all those gathered outside Hilton Hotel walked to Padang Song Kheng Hai. The respondents were in this group. The police were stationed all along the route to the Padang Song Kheng Hai. They took photographs and video clips. The police witnesses testified that at times the group had encroached on to the road instead of keeping themselves on the sidewalk. Some in the group were seen displaying BERSIH banners prominently. Some were even heard shouting political slogans. They reached Padang Song Kheng Hai around 3pm.

F [7] The case of the prosecution that was unfolded by the police witnesses on the ground is that the movement of the people from Hilton Hotel to Padang Song Kheng Hai constituted a “street protest” within the meaning of the PAA 2012 notwithstanding the fact that they wanted to participate in the approved BERSIH assembly at the latter venue.

G **Offence Of Street Protest Under PAA 2012**

H [8] Before proceeding to discuss the decision of the Sessions Court and the grounds of appeal, for ease of reference, I shall set out the offence creating provision in question and the related definitions under the PAA 2012. Parliament has prohibited a “street protest” although s. 2 of the PAA 2012 states the object of the legislation is to ensure:

I (a) so far as it is appropriate to do so, that all citizens have the right to organise assemblies or to participate in assemblies, peaceably and without arms; and

- (b) that the exercise of the right to organise assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons. A

[9] Section 4(1) reads as follows in part: B

The right to organize an assembly or participate in an assembly peaceably and without arms under this Act **shall not extend** to the following:

(a)-(b)

(c) a street protest; C

(d)-(e)

(emphasis added)

[10] Section 4(2) outlaws a street protest. It reads as follows: D

A person commits an offence if:

(a)-(b)

(c) he organises or participates in a street protest;

(d) ...

(emphasis added) E

Under sub-s. (c), the punishment for the above-mentioned offence is a fine not exceeding ten thousand ringgit.

[11] In s. 3 of the PAA 2012, a street protest means: F

an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes;

Other relevant definitions in s. 3 are as follows:

“assembly” means an intentional and temporary assembly of a number of persons in a public place, whether or not the assembly is at a particular place or moving; G

“participant” means a person intentionally or voluntarily present for the purpose of an assembly;

“public place” means: H

(a) a road;

(b) a place open to or used by the public as of right; or?

(c) a place for the time being open to or used by the public, whether or not: I

- A (i) the place is ordinarily open to or used by the public;
(ii) by the express or implied consent of the owner or occupier; or
(iii) on payment of money;
(iv) ...

B [12] Having regard to the above provisions, the main elements of the offence under s. 4(2) are:

- (a) That a street protest had taken place; and
(b) That the respondents had either organised it or had participated in it.

C In the instant case, the respondents were charged with participating in a street protest.

Finding Of Sessions Court

D [13] The learned Sessions Court Judge considered the evidence of the police witnesses who monitored the movement of people from Hilton Hotel to Padang Song Kheng Hai and concluded that it was not a street protest within the meaning of the PAA 2012.

E [14] The learned Sessions Court Judge's reasons for finding that the gathering of people in front of Hilton Hotel and their movement to Padang Song Kheng Hai is not a street protest can be briefly stated as follows. He stated that "intention" is an element of the offence as a street protest means an "open air assembly". And an "open air assembly" refers to "an intentional and temporary assembly". He said that only when people intentionally gather at a specified place to march for the purpose of objecting to or advancing any particular cause, it can be said that there is a street protest.

F [15] He made a finding of fact that people gathered in front of the Hilton Hotel at 1pm on the said day for the purpose of parking their cars and to avoid traffic congestion on the instruction of the organisers. He found that their purpose was to proceed to Padang Song Kheng Hai for the police approved assembly and that marching on the streets to advance a particular cause was not their purpose. He also found as a fact that the police had ordered the people gathered at the Hilton Hotel to move to Padang Song Kheng Hai and since there were many of them, they had on occasions encroached on to the road. They held banners and flags because they brought those things for the purpose of the assembly at Padang Song Kheng Hai.

G [16] The learned Sessions Court Judge also found that the act of the participants in complying with the directions of the organisers or the police for the purpose of participating in an approved event was a "preparatory act" and that it comes within the object of the PAA 2012 which facilitates a peaceful assembly.

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[17] The learned Sessions Court Judge also considered the behaviour of the crowd during their walk to the Padang Song Kheng Hai. He said it was a peaceful march without violence, obstruction or nuisance. He also said the police never ordered them to disperse.

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[18] The learned Sessions Court Judge also considered the evidence of a police officer (PW7, ASP Ricky Poh) who said that the first respondent shouted political slogans (Bersih dan Undur Najib) at Jalan McDougall. The learned Sessions Court Judge reasoned that since “Jalan McDougall” is not stated in the charge, the said evidence is outside the scope of the charge. Nonetheless, he did not accept the evidence of PW7 as he found it to be inconsistent with the evidence of photographs and video clips taken at Jalan McDougall. He also said that two other witnesses (PW1 and PW2) did not say that the first respondent shouted political slogans when moving along Jalan McDougall. He also said that the police reports lodged by PW7 the same day did not mention the alleged incident at Jalan McDougall. Furthermore, during cross-examination, PW7 agreed to the suggestion that he was not certain what the first respondent uttered. In fact, he retracted his earlier statement and said that it was the group as whole that uttered the words in question and that it was not the first respondent who had done so.

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[19] Finally, the learned Sessions Court Judge opined that even if the movement of the people had become a street protest, the police had duty to disperse it.

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[20] In respect of the element of participation, the learned Sessions Court Judge found that the respondents were not “intentionally and voluntarily present” when the said group of people walked from Hilton Hotel to Padang Song Kheng Hai as the police and the organisers had directed them to move to Padang Song Kheng Hai.

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Grounds Of Appeal

[21] In the petition of appeal, the appellant raised numerous grounds of appeal. Most of the grounds pertain to the finding of the Sessions Court Judge that there was no street protest. They can be summarised as follows.

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- (a) That the Sessions Court Judge gave a narrow interpretation to street protest and marching.
- (b) That he was swayed by the fact that it was a peaceful movement of people.
- (c) That he wrongly rejected PW7’s evidence by saying it was not reflected in photographs and video clips.
- (d) That Sessions Court Judge paid emphasis to the fact that the respondents did not lead the crowd.

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- A (e) That the Sessions Court Judge wrongly linked the offence of participating in a street protest under s. 4 of the PAA 2012 to other provisions of the same Act.
- B (f) The Sessions Court Judge was guided by the fact that the participants wanted to go the Padang Song Kheng Hai venue by marching on the road and did not consider the meaning of street protest.
- (g) The Sessions Court Judge did not consider the fact that the respondents intentionally assembled in front of the Hilton Hotel and took a longer route to Padang Song Kheng Hai.
- C (h) That the Sessions Court Judge did not consider properly the visual images that were presented.
- (i) That the Sessions Court Judge wrongly applied two authorities that considered the offence of “unlawful assembly” when this case concerns a street protest.
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Arguments Of The Appellant

[22] In written submissions and the oral arguments, the learned Deputy Public Prosecutor (DPP) raised the following points.

- E [23] He argued that it was wrong for the Sessions Court Judge to link the procession of the people from Hilton Hotel to Padang Song Kheng Hai to the assembly at the latter venue. He said the movement of people was a street protest and therefore it was not part and parcel of the peaceful assembly at Padang Song Kheng Hai.

- F [24] Secondly, the learned DPP also argued that the movement of people from Hilton Hotel to Padang Song Kheng Hai satisfied all the elements of the definition of a street protest under s. 4 of the PAA 2012.

- G [25] Thirdly, the learned DPP argued that the Sessions Court Judge wrongly reasoned that a peaceful and orderly movement without an untoward incident would negate the existence of a street protest.

- [26] Fourthly, the learned DPP submitted that the Sessions Court Judge wrongly accepted the argument of the defence that the failure of the police to take action to disperse the movement of people from Hilton Hotel to Padang Song Kheng Hai is proof that there was no street protest.

- H [27] Fifthly, the learned DPP submitted that the directive of the police to move from Hilton Hotel to Padang Song Kheng Hai was not an order under s. 7(b) of the PAA 2012 as that provision only applied to the lawful assembly at Padang Song Kheng Hai. Section 7(b) of the PAA 2012 provides that participants of an assembly must comply with the orders of the organisers or the police. He said the instant case concerned a street protest which is prohibited by the PAA 2012 and not an approved assembly.
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Arguments On Behalf Of The Respondents

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[28] The main argument of counsel for respondents is that the gathering and movement of people from Hilton Hotel to Padang Song Kheng Hai did not amount to a street protest for the following reasons:

- (a) The evidence elicited from the police witnesses particularly PW5 (the Kuching OCPD) was that the police issue a directive to those gathered outside Hilton Hotel to move to Padang Song Kheng Hai. B
- (b) The organisers of the approved assembly at Padang Song Kheng Hai had also directed those gathered outside Hilton Hotel which included the respondents to move to Padang Song Kheng Hai. The reason behind the gathering outside Hilton Hotel was to manage traffic and ease congestion. C
- (c) The intent or purpose of the participants in walking from Hilton Hotel to Padang Song Kheng Hai is important. It was to access the venue of the approved assembly. It was not their purpose to object or to advance any particular cause within the meaning of the definition of “street protest” under the PAA 2012. Counsel for respondents submitted that the act of the group of people to meet outside Hilton Hotel, park their cars and move to Padang Song Kheng Hai was an act preparatory to another event, ie, the approved assembly. D E
- (d) The police did not use their powers to disperse the crowd using their powers under s. 21 of the PAA 2012 which they could have done if it was a street protest.
- (e) Some of the police witnesses agreed that it would not be a street protest if the participants complied with a police directive to move to Padang Song Kheng Hai. F

Decision

[29] I am mindful that counsel for respondents had submitted that finding of fact is the domain of the trial judge and that the appellate court should not lightly interfere with it. However, it is trite law that an appellate court can interfere with findings of fact if the trial court had wrongly evaluated the facts or had asked the wrong questions. It would be otherwise if the finding of fact is based purely on demeanour of witnesses. G

[30] The main issue in this case is whether the mass march of people from Hilton Hotel to Padang Song Kheng Hai constituted a ‘street protest’ within the meaning of PAA 2012. If it did, the follow-up question would be whether there was sufficient credible evidence to prove that the respondents had participated in the said street protest. It would not matter a jot whether the respondents had organised the said street protest because participation is an offence. H I

- A [31] The main argument of the respondents which appeared to have been wholly accepted by the learned Sessions Court Judge can be reduced to this. It is not a street protest because the people who had marched to Padang Song Kheng Hai from Hilton Hotel wanted “to access” the former venue where an approved assembly was about to take place. Thus, they had no intention to
- B partake in a street protest and it was not the purpose of the walk to advance any particular cause either.

- [32] In my view, the learned Sessions Court Judge fell into error in ruling that the fact that the participants of the said walk wanted access to Padang Song Kheng Hai venue meant that there could not have been a street protest.
- C The PAA 2012 has provided a definition of what constitutes a street protest. In the premises, if there is credible evidence to support the elements of the statutory definition of a street protest and that there is evidence that the respondents had participated in it, defence should have been called on the said charge.

- D [33] In the definition of street protest, Parliament did not provide that the dominant purpose or a secondary purpose of a mass march would negate the offence street protest. In other words, the purpose of objecting to or advancing a particular cause may co-exist with another purpose which in this case is accessing the approved assembly venue at Padang Song Kheng Hai.
- E Thus, if from the point of departure to the point of arrival, the intended walk had metamorphosed into a street protest as well within the meaning of the PAA 2012, it is no defence to say that the street protest was not the dominant purpose or the original purpose of the march. Intention is a matter of inference and it is trite law that it can develop on the spot. Otherwise,
- F Parliament’s aim in creating the offence of street protest would be completely frustrated.

- [34] All these mean that the learned Sessions Court Judge should have considered whether the evidence supports the elements of a street protest regardless of whether the participants had also wanted to access the Padang Song Kheng Hai assembly venue. The answers of the police witnesses during
- G cross-examination that there could not have been a street protest merely because the participants had obeyed their orders to walk to Padang Song Kheng Hai is not relevant either. This is a legal question. Whether or not there was a street protest is a matter for the court to determine upon
- H considering the elements of the offence and the evidence.

- [35] The elements that constitute a ‘street protest’ in the definition provided by PAA 2012 are as follows:

- (a) an open-air assembly;
- I (b) the participants gathered at a specified place;
- (c) they proceeded in mass march or rally;

(d) for the purpose of objecting to or advancing or a particular cause or causes.

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[36] The prosecution tendered unchallenged evidence that the participants numbering over 200 had gathered outside Hilton Hotel from 1pm onwards. According to the police witnesses, these numbers had swelled to 400 later. The learned Sessions Court Judge also mentioned in his judgment that a large group had gathered outside the hotel. He noted that they carried flags and banners. In the premises, there is evidence to support the first two elements in the definition of a street protest.

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[37] In respect of the third element, the learned Sessions Court Judge accepted the evidence that the group of people walked from Hilton Hotel to Padang Song Kheng Hai through the routes stated in the charge. The evidence on the point that a large group of people had walked together and even encroached onto the road not only came from the police witnesses but also from the photographs and video clips. In the premises, there is evidence to support the third element of the offence. I should also think that it is unnecessary to enter into a semantic analysis of the meaning of “marching” ie, whether it involves regular steps, rhythmic and measured pace like soldiers’ march or walking at own one’s own free pace. The focus of the definition is whether a group of people had walked together not whether in what style or fashion they walked.

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[38] The fourth element in the definition of street protest is that the mass march must be for the purpose objecting to or advancing a particular cause or causes. I had made reference to this element earlier. The learned Sessions Court Judge said that because the participants wanted to access the Padang Song Kheng Hai assembly venue there was no street protest. However, he should also have considered the following credible evidence that supports the case of the prosecution that the participants wanted to advance the cause of BERSIH while walking towards Padang Song Kheng Hai:

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(a) PW5 (the Kuching OCPD) told the court that the crowd started to gather at 1pm outside Hilton Hotel but they did not straightaway walk to Padang Song Kheng Hai. They stayed there until 2pm or later until their numbers swelled to 400. According to PW5, the first respondent refused to leave Hilton Hotel until more people joined the group. Only then, they walked in a group.

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(b) In the instant case, the appellate court is not confined to cold print evidence only. The photographs and video clips provide a measure of audio-visual advantage as well. The crowd of people had clearly spilled onto the road and had prominently displayed and waved banners, placards and flags that support the cause of BERSIH.

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- A (c) PW7 said political slogans were shouted by the first respondent at Jalan McDougal. Later he backtracked and said that it was the group that shouted slogans. Even so, the question is whether the entire group had converted the walk into a street protest and not whether the first respondent alone had shouted political slogans.
- B (d) The police witnesses also testified unchallenged that the crowd took a longer route to the Padang Song Kheng Hai.

[39] In the premises, there is credible circumstantial evidence to support the fourth element.

- C [40] In respect of the participation of the respondents, in various passages of the judgment, the learned Sessions Court Judge stated that the respondents had walked among the participants to Padang Song Kheng Hai from Hilton Hotel *albeit* in a peaceful manner without arms and without incident. As pointed out by the learned DPP, whether a mass march is peaceful or not is not relevant for the purpose of definition of a street protest. Therefore,
- D since there is *prima facie* evidence of the participation of the respondents in the said march, defence should have been called.

- E [41] I am mindful that counsel for respondents submitted the defence of mistake of fact which is a general exceptions defence found in the Penal Code. However, at this point, there is no evidence in the record to support it. I note that the defence has not even been called. The learned Sessions Court Judge did not address it in his judgment.

- F [42] In respect of the argument that the police did not disperse the march and therefore it was not a street protest, there is plainly no merit in it. It is an operational matter within their discretion. The only relevant question that should be asked is whether the evidence supports the case of the prosecution that walk to the Padang Song Kheng Hai from Hilton Hotel constituted a street protest and whether the respondents participated in it.

- G [43] In the instant case, the prosecution had tendered credible evidence in respect of all the elements of the offence under s. 4(2)(c) of the PAA 2012 and therefore the Sessions Court Judge should have found that a *prima facie* case had been established. For the foregoing reasons, I shall allow the appeal and set aside the order of acquittal and order both respondents to enter their defence on the said charge before the same Sessions Court Judge.

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